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In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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We demonstrated in our opening brief (at 25-29) that the interpretation of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), adopted by the court of appeals, if correct, would eliminate the immunity defense in virtually every *Bivens* action in which the plaintiff's claim is grounded in the Fourth Amendment. Respondents and amicus American Civil Liberties Union (ACLU) do not dispute our conclusion; they enthusiastically embrace that result (Resp. Br. 26-29; ACLU Br. 22-23). This Court's decisions provide no basis for the court of appeals' radical reduction in the protection against monetary liability afforded to law enforcement officers. They instead make clear that an officer may be held liable in damages only if, in view of the law at the time of the events at issue, a reasonable officer would have known that the challenged conduct violated the Constitution.

1. Respondents and the ACLU contend that our position is inconsistent with both this Court's decision in *Harlow* and the policies underlying the qualified immunity doctrine. Their arguments are plainly wrong.

a. The principal argument advanced against our position (Resp. Br. 20-26; ACLU Br. 10-15) is that *Harlow* mandates an objective immunity standard, and that petitioner's immunity defense therefore cannot depend upon a case-specific inquiry into the facts known to law enforcement officers at the time petitioner entered respondents' home. But this Court in *Harlow* was not presented with that issue; moreover, the Court subsequently has acknowledged that such an inquiry may properly be undertaken in connection with the immunity determination.

Prior to the Court's decision in *Harlow*, the immunity defense had "both an 'objective' and a 'subjective' aspect" (*Harlow*, 457 U.S. at 815). A government official forfeited his immunity if he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury" (*Wood* v. *Strickland*, 420 U.S. 308, 322 (1975)). The *Harlow* Court eliminated the subjective component of this standard, holding that an official's entitlement to immunity turns solely on "the objective reasonableness of [the] official's conduct, as measured by reference to clearly established law" (457 U.S. at 818 (footnote omitted)).

The question in this case is how the objective reasonableness test should be applied when the settled constitutional standard governing a defendant's conduct contains as one element of the constitutional standard itself a case-specific factual inquiry, such as the inquiry into petitioner's knowledge required under the Fourth Amendment. That issue was not addressed in *Harlow*, which eliminated the portion of the immunity test mandating an inquiry into the defendant's subjective good faith. The Court did not purport to deal with the present situation

where the facts known to petitioner are an element of the clearly established constitutional right that is implicated and thus are inescapably relevant in determining whether that right has been violated.

The parties in the present case offer two different approaches for applying *Harlow* in this context. Respondents assert that all case-specific factual inquiry should be precluded. Under that approach, the defendant would be deprived of his immunity whenever the abstract constitutional standard that governed his conduct—in this case the requirements of probable cause and exigent circumstances—was clearly established. Respondents' rule is not only fundamentally inconsistent with *Harlow*; it would result in a drastic reduction in the protection from damages liability afforded to law enforcement officers and other government officials.

We contend that the immunity test encompasses the factual inquiry required by the governing constitutional standard. Thus here the question is whether a reasonable officer could have believed that the facts known to petitioner constituted probable cause and exigent circumstances justifying a warrantless search.[1]

This Court's recent decision in *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), demonstrates that our interpretation of *Harlow* is correct. The issue in *Malley* was whether an officer who executed an arrest warrant could be held liable in damages if a court subsequently determined that the warrant was not supported by probable cause. This Court rejected the defendant's claim that a police officer

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[1] A third alternative is possible. The official could be entitled to immunity whenever the governing constitutional standard turns upon a case-specific factual inquiry. This alternative would fulfill respondents' desire to eliminate all factual inquiry, but triggers immunity as indiscriminately as respondents would deny it.

is immune from monetary liability whenever the challenged conduct was authorized by a warrant. It further stated, however, that the officer would be immune from damages liability unless "a reasonably well-trained officer *in [the defendant's] position* would have known that his affidavit failed to establish probable cause and that he should not have applied for [a] warrant" (slip op. 9 (emphasis supplied)). Thus, the Court concluded that the resolution of the officer's immunity claim turned upon a case-specific factual inquiry.

The relevant facts in the warrant context are, of course, the facts before the court that issued the warrant. See *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971). In the warrantless search context, the analogous inquiry turns upon the facts known to the officer at the time that he performs the search or makes the arrest. See *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964). *Malley* thus makes clear that an inquiry into these facts is appropriate under *Harlow*.

Respondents and the ACLU attempt to distinguish *Malley* based on the existence of a warrant in that case, and suggest that a different rule is appropriate where, as here, there has been no prior judicial authorization of the search (Resp. Br. 25-26; ACLU Br. 29-30). But nothing in *Malley* indicates that the Court's discussion of the *Harlow* standard was influenced by the fact that the police officer acted pursuant to a warrant. Indeed, *Malley* rejected the argument that a special immunity rule should apply when officers act pursuant to a warrant, and affirmed that the immunity of such officers is governed by the general standard announced in *Harlow*. Under *Malley*, therefore, petitioner can be deprived of immunity only if a "reasonably well-trained officer in [petitioner's] position would have known"—from the relevant constitutional standards and the decisions applying those standards in particular circumstances—that the information known to law enforcement officers about Vadaain Dixon did not

establish probable cause and exigent circumstances. *Malley* v. *Briggs*, slip op. 9; see also *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985).[2]

b. Respondents' contention that petitioner's immunity should not turn upon an inquiry into the particular facts of this case suffers from a more basic flaw: it is wholly incompatible with *Harlow*'s conclusion that a government official should be subjected to damages liability only when the official "could be expected to know that [his] conduct would violate statutory or constitutional rights" (*Harlow*, 457 U.S. at 819). As we showed in our opening brief (at 25-29), the legal standards identified by the court of appeals—the requirements of exigent circumstances and probable cause—do not, without reference to a particular factual context, provide any guidance in determining whether a particular search would violate the Constitution. And the search for "clearly established law" becomes meaningless if the legal rule need not be sufficiently particular to enable a reasonable official to determine whether his conduct is constitutional. Indeed, clearly

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[2] The ACLU mischaracterizes (Br. 7, 37) our position by asserting that under our approach an official will be divested of immunity only if "the particular conduct of which [he] has been accused has previously been held illegal" and that immunity will be available to law enforcement officers "whose conduct indicates ignorance or willful disregard of controlling cases in this Court." In fact, a prior decision addressing the precise factual circumstances is not required, and the officer's actual ignorance of clearly established law is irrelevant. The relevant inquiry is the one framed by this Court in *Malley*—whether a reasonably competent officer in that officer's position, *i.e.*, possessed of the knowledge that officer had, would have recognized that the conduct was unlawful (slip op. 9 & n.8).

The ACLU also states that the standard for which we contend is a departure from *Harlow* because it inquires "whether the official 'could reasonably have believed that his (action) was legally justified' " (ACLU Br. 33-34, quoting Pet. Br. 30). But that is virtually the precise language that the Court used in *Harlow* and *Malley*. See *Harlow*, 457 U.S. at 818, 819; *Malley*, slip op. 9 & n.8.

established law always can be found at some level of generality, and the Court has rejected the argument that the existence of a general constitutional standard is by itself sufficent to defeat an immunity claim (see Pet. Br. 15-20).

Respondents do not seriously contend that the concepts of probable cause and exigent circumstances themselves enable an officer to determine the legality of particular conduct. Instead, they assert simply (Br. 15-35) that the existence of a settled legal standard is sufficient to eliminate immunity. That rule, of course, would drastically reduce the protection provided by *Harlow* (see Pet. Br. 25-29).

Amicus ACLU argues (Br. 18-21, 25-29, 39-45) that the generality of the applicable Fourth Amendment standards is beside the point because those standards themselves protect law enforcement officers by providing a margin for official error. As we showed in our opening brief (at 25-29), however, an officer would be subject to damages liability whenever he violated the Fourth Amendment, no matter how close the issue or how understandable the officer's error. The Fourth Amendment standards thus do not provide the "ample room for mistaken judgments" that the immunity defense is designed to ensure (*Malley*, slip op. 7).[3]

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[3] In attempting to support its position, the ACLU cites (Br. 19-20) as "the kind of reasonable error that is incorporated into the probable cause concept" the situation in which "an officer arrests a robbery suspect on the strength of a mistaken identification." But where an officer relies on an identification provided by a witness and the identification turns out to be mistaken, the officer has not committed any error at all. In addition, the ACLU's example gives no comfort to the officer who makes an erroneous judgment by, for example, mistakenly concluding that the facts that he knows amount to probable cause. This Court has recognized the latter determination to be extremely difficult (see Pet. Br. 28-29) and, under the ACLU's theory, the officer would be liable in damages every time that he erroneously concludes

Moreover, the ACLU's attempt (Br. 23-28, 39-40) to equate the probable cause standard with *Harlow*'s objective reasonableness standard is plainly wrong. Probable cause looks to whether the law enforcement officials have information "sufficient to warrant a prudent man" in arriving at certain conclusions about the likelihood of criminal conduct or the presence of evidence (*Beck* v. *Ohio*, 379 U.S. at 91). The *Harlow* standard, by contrast, turns upon a comparison of an official's conduct with the then-existing caselaw, and asks whether the conduct violated clearly established rights. It is thus quite possible that a search may violate the Fourth Amendment for lack of probable cause, but nonetheless satisfy the *Harlow* test because the officer's conduct was not clearly unconstitutional under the case law at the time the search occurred.

Indeed, this Court's decision in *Malley* rests squarely upon the conclusion that an officer's conduct may violate the Fourth Amendment and yet be objectively reasonable within the meaning of *Harlow*. As the Court stated, even an officer who violates the Fourth Amendment is protected by immunity unless "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause." Slip op. 9; see also *United States* v. *Leon*, 468 U.S. 897, 922-923, 926 (1984) (finding that officer's reliance on a warrant was objectively reasonable even though the warrant was not supported by probable cause).[4]

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that a set of facts amount to probable cause. Without any room for error, officers may well become timid and protect themselves from monetary liability by refusing to proceed against a wrongdoer absent overwhelming evidence of criminal activity. Although the ACLU endorses that result (Br. 41 n.6), such a chilling effect upon legitimate government conduct is precisely what the *Harlow* standard is designed to avoid (see Pet. Br. 23-25).

[4] Respondents warn darkly (Br. 40) that "one of the government's major if unacknowledged goals in this litigation" is the extension of

c. Respondents (Br. 20-22) and the ACLU (Br. 33-39) also argue that any factual inquiry into the defendant's knowledge is contrary to *Harlow* because it would transform what should be a wholly legal inquiry into a fact-specific determination, and make impossible the expeditious resolution of immunity claims on motion for summary judgment. But *Harlow* did not indicate that all immunity claims would raise solely legal issues or that every case could be determined on summary judgment. Indeed, some facts must be adduced prior to the adjudication of every immunity claim so that the court may determine the conduct that is in issue and the constitutional standard by which that conduct is to be measured. The Court in *Harlow* stated only that its standard would "permit the resolution of many insubstantial claims on summary judgment." 457 U.S. at 818; see also *Mitchell* v. *Forsyth*, 472 U.S. at 526-527 (recognizing that an immunity defense may be based upon facts uncovered through discovery). Frequently, there will be no dispute about the facts, and a court will be able to adjudicate the immunity claim on motion for summary judgment. Where the facts

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the good faith exception recognized in *United States* v. *Leon, supra*, to the warrantless search context. However, the question whether to broaden the good faith exception as it applies to the exclusion of evidence involves considerations other than those relevant to the inquiry under *Harlow*, and a decision for petitioner in this case would not be determinative of that issue (Pet. Br. 20-21 n.12).

Respondents (Br. 35-39) and the ACLU (Br. 44-45) suggest that the rule for which we contend will somehow alter the probable cause and exigent circumstances standards themselves. That is obviously wrong. The question in this case is the meaning of the immunity standard adopted in *Harlow*, not the interpretation of these Fourth Amendment principles, which apply both in suppression hearings and in determining whether a *Bivens* defendant actually violated the Constitution. Respondents' claim (Br. 27-29) that the rule for which we contend will hinder the development of Fourth Amendment law is also flawed. Those issues will continue to be litigated, as they have been in the past, in suppression hearings in criminal cases.

are in dispute, some discovery may be warranted; but summary judgment subsequently may be appropriate if the evidence developed in discovery resolves the factual dispute.[5]

Also, respondents' position—that the need to avoid discovery justifies a drastic reduction in the immunity available to law enforcement officers in the Fourth Amendment context—is quite bizarre in view of the Court's determination that the monetary liability of government officials should be limited to situations where the officials could have known that their conduct violated the Constitution. Faced with a choice between permitting some discovery and depriving an officer of immunity, respondents choose to eliminate immunity. That conclusion simply cannot be reconciled with the principles that underlie this Court's decision in *Harlow*.[6]

2. Respondents argue (Br. 33-35) that the indemnification policy recently adopted by the Department of Justice eliminates the need for any "broadened" immunity doctrine. The policy "permits, but does not require, the De-

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[5] The defendant in a case presenting a Fourth Amendment claim typically will file a motion for summary judgment on immunity grounds supported by an affidavit listing the facts that he knew at the time of the challenged conduct. The issue can be resolved on summary judgment if (1) the plaintiff does not challenge the facts set forth in the affidavit, or (2) the defendant would be entitled to immunity even if the facts were as the plaintiff asserts them to be. Where necessary in view of the nature of the facts in issue, the court may order limited discovery before ruling on the motions for summary judgment.

[6] This case does not present any question regarding the application of the *Harlow* test when the established constitutional standard that governed the defendant's conduct has as an element and therefore directs an inquiry into a government official's purpose; purpose is not an element of the "constitutional tort" in this case and thus petitioner's motivation is irrelevant under the Fourth Amendment (see pages 11-12, *infra*). In defending other individuals sued in *Bivens* actions where purpose (as contrasted to factual beliefs) does constitute an element of the "constitutional tort", the United States has advanced the

partment to indemnify a Department employee who suffers an adverse verdict, judgment, or other monetary award provided that the actions giving rise to the judgment were taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General" (51 Fed. Reg. 27022 (1986)). The decision whether a Department of Justice official will be indemnified generally will not be made until after the entry of an adverse judgment against the official (*ibid.*, to be codified at 28 C.F.R. 50.15(c)(3)).[7] And in any event this policy does not extend to other federal officials—*e.g.* agents of the IRS, Customs Service, Coast Guard, etc.—who also exercise responsibilities that may lead to potential claims under the Fourth Amendment.

This indemnification policy is irrelevant to the question presented in this case regarding the scope of immunity under *Harlow*. The basic reason for conferring immunity on government officials, this Court has observed, is that an official would be deterred from forcefully exercising his authority if he could be required to answer in damages for actions that were not unreasonable in light of the circumstances at the time they were undertaken. *Wood* v. *Strickland*, 420 U.S. at 319-320; Pet. Br. 23-25. Because the decision whether to indemnify an official generally is not made until after the entry of an adverse judgment, a Justice Department official will not know at the time that he acts whether or not he will be indemnified. The indemnification policy thus will not eliminate the chilling effect

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view that the rationale of *Harlow* reasonably extends to barring the probing of a defendant's subjective purpose. *Halperin* v. *Kissinger*, No. 84-5095 (D.C. Cir. Dec. 5, 1986).

[7] As an agent of the Federal Bureau of Investigation at the time of the events at issue in this case, petitioner would be eligible for indemnification under this policy.

that flows from the fear of monetary liability, and immunity remains an important protection assuring vigorous conduct by public officials.[8]

3. Both respondents and the ACLU make a variety of erroneous statements concerning petitioner's entitlement to immunity in this case. As we explained in our opening brief (at 30-34), we do not seek the resolution of petitioner's immunity claim by this Court, but urge a remand to allow the lower courts to apply the proper legal standard to petitioner's immunity claim. To avoid any misunderstanding regarding the issues in this case, however, we will briefly respond to these misstatements.

First, respondents plainly err in asserting (Br. 14, 19-20 & n.2, 51-52) that we have "confess[ed] error" by stating that discovery may be appropriate on remand. The court of appeals in this case rejected petitioner's immunity claim on the merits. If this Court reverses the court of appeals' judgment and remands the case for further proceedings, the district court will be free to order the discovery that it deems appropriate.[9]

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[8] The ACLU argues (Br. 31-33) that the immunity rule for which we contend is inappropriate because an officer was not entitled to immunity at common law if a warrantless arrest subsequently was found to be unlawful. Even if the ACLU's argument were true, it would be irrelevant because this Court stated in *Harlow* that the immunity standard there adopted applies to any "government official[] performing discretionary functions." 457 U.S. 818; see also *id.* at 821 (citation omitted) (Brennan, J., concurring) (the *Harlow* standard "applies 'across the board,' to all 'government officials performing discretionary functions' "). Moreover, it is not at all clear that petitioner would not have been entitled to immunity at common law. One of the authorities cited by the ACLU recognizes the immunity defense in this context, stating that an officer "is protected in every case where he acts under a reasonable mistake as to the existence of facts which * * * justify an arrest without a warrant" (Restatement (Second) of Torts § 121 comment i (1965)).

[9] We discussed the considerations governing the availability of discovery in our opening brief (at 33-34 n.18). Contrary to respond-

Second, both respondents (Br. 48-51) and the ACLU (Br. 28-29 n.5, 37, 40-41) repeatedly refer to petitioner's subjective beliefs regarding his authority to enter respondents' home and thus suggest that those beliefs are somehow relevant to the immunity inquiry. But this Court has made clear that a law enforcement officer's subjective beliefs are irrelevant under the Fourth Amendment. *Florida* v. *Royer*, 460 U.S. 491, 507 (1983) (plurality opinion); *Director General* v. *Kastenbaum*, 263 U.S. 25, 27-28 (1923); Pet. Br. 30 n.16. And, as we have discussed, *Harlow* eliminated the general inquiry into the defendant's subjective intent required under the prior immunity standard. Thus, petitioner's subjective beliefs are wholly irrelevant here.

Third, respondents argue (Br. 51-58) that the court of appeals properly reversed the district court's determination that petitioner's actions complied with the requirements of the Fourth Amendment. We did not seek review of the court of appeals' determination that—on this record—the question whether petitioner violated respondents' Fourth Amendment rights presents a jury issue (see Pet. App. 7a). All that we seek here is the reversal of the court of appeals' improper elimination of petitioner's immunity defense so that on remand petitioner will have an opportunity to establish his entitlement to immunity under the correct legal standard.

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ents' assertion (Br. 19-20 & n.2) we did not concede that discovery would be appropriate in this case. That is a question to be resolved by the district court on remand.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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